

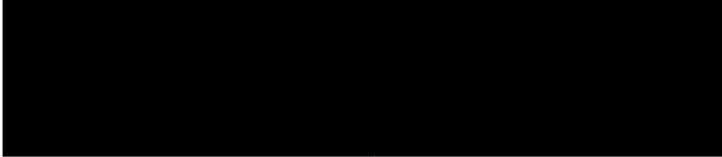


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U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: LIN-01-168-52087 Office: Nebraska Service Center Date: JUL 18 2002

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an international freight forwarding business with five employees and a gross annual income of \$300,000. It seeks to extend its authorization to employ the beneficiary as an operations manager for a period of three years. The director determined the petitioner had not established that the beneficiary was eligible for any further extensions.

On appeal, counsel submits a brief.

Section 101(a) (15) (H) (i) (b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a) (15) (H) (i) (b), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i) (1) of the Act, 8 U.S.C. 1184(i) (1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to section 214(i) (2) of the Act, 8 U.S.C. 1184(i) (2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The director denied the petition because the petitioner had not demonstrated that it qualifies for the exemption from limitation provided for in Section 106 of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (AC21).

On appeal, counsel states, in part, that:

Since the Labor Certificate application filed by the petitioning employer on behalf of the beneficiary was pending for an extended period of time and since no alternative was available to expedite the process in order to prevent any burden upon the beneficiary, the petitioning employer filed a second Labor Certificate on January 5, 2001 through the Reduction in Recruitment method since no alternative was available at that time to convert the originally pending labor

certificate to an expedited manner of adjudication. Therefore, since the petitioning employer and beneficiary could not convert the pending application to a Reduction in Recruitment case due to the fact that final regulations had not been [signed] at that time, the petitioning employer took the only course of action available and filed another labor certificate application for the beneficiary in the same position as the initial labor certificate. Although the second labor certificate application supplied the basis for the pending employment based immigrant petition which was approved on behalf of the beneficiary, the beneficiary should still be allowed to obtain an additional one year in H-1B status under Section 106 of AC21 since no alternative existed for the petitioning employer to expedite the process and since the Congressional intent would be furthered by allowing the beneficiary to take advantage of the provisions of Section 106 of AC21.

Section 106 of AC21 permits H-1B nonimmigrants to obtain an extension of H-1B status beyond the 6-year maximum period, when:

(a) the H-1B nonimmigrant is the beneficiary of an employment based (EB) immigrant petition or an application for adjustment of status; and

(b) 365 days or more have passed since the filing of a labor certification application, Form ETA 750, that is required for the alien to obtain status as an EB immigrant, or 365 days or more have passed since the filing of the EB immigrant petition.

The record contains two letters dated November 9, 1999 and May 6, 2001, respectively, from the Illinois Department of Employment Security, indicating that the petitioner's application for alien certification is still pending. The record also indicates that the filing date of the petitioner's immigrant petition on behalf of the beneficiary is June 20, 2001. As such, the record does not demonstrate that at the time of the filing of the instant petition for an extension of the beneficiary's nonimmigrant H-1B status on May 4, 2001, either 365 days or more had passed since the filing of the labor certification application, Form ETA 750, or since the filing of the EB immigrant petition. It is also noted that the petitioner has obtained a new labor certification based upon the Department of Labor's Reduction in Recruitment processing. As such, the provisions of AC21 do not apply in this case since the approval of the I-140 visa petition was not based upon the pending labor certification from 1999. In view of the foregoing, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner

has not sustained that burden. Accordingly, the decision of the director will not be disturbed.

**ORDER:** The appeal is dismissed.